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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/596,116	03/04/2008	Jacob Guth	034547-0118	2271
23428 7590 05/27/2011 FOLEY AND LARDNER LLP SUITE 500 3000 K STREET NW WASHINGTON, DC 20007			EXAMINER GREENE, IVAN A	
			ART UNIT 1619	PAPER NUMBER
			MAIL DATE 05/27/2011	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/596,116	Applicant(s) GUTH ET AL.
Examiner IVAN GREENE	Art Unit 1619

—The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

THE REPLY FILED 06 May 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 05/06/2011. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1, 2 and 4-8.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/CHERIE M WOODWARD/
Primary Examiner, Art Unit 1647

Continuation of 11. does NOT place the application in condition for allowance because: Applicant has canceled the new matter "intact vegetable oil bodies" and inserted the language "discrete spheres of vegetable oil bodies." The amendment is supported by the instant specification on page 1, last paragraph, though the examiner expressly disagrees that the language "intact vegetable oil bodies" is implied by "discrete spheres of vegetable oil bodies" as applicant appears to argue on, e.g., page 8, line 10.

Regarding the 112 2nd rejection of the language "no additional emulsifier", applicant argues that a person having ordinary skill in the art to which the instant invention pertains, informed by the original specification, would readily apprehend the meaning of the term "emulsifier." (p. 6, last paragraph). As the instant specification describes an emulsifier as an ingredient that can be used to bind or mix together two or more immiscible substances (like oil and water) and prevent them from separating. In response the examiner argues that, though a person having ordinary skill in the art would know the function of an emulsifier, it is not clear from the disclosure what the metes and bounds of the emulsifier should be because a broad range of chemicals exist which may have some character of an emulsifier. Accordingly, persons of ordinary skill in the art may likely disagree what exactly constitutes an emulsifier based upon the language of the disclosure. Based upon the broad range of chemical structures having an emulsifying character a person having ordinary skill in the art would not be well informed what exactly the metes and bounds of the claimed invention should be.

Regarding the reference LORANT, applicant argues that the oil described therein would have inherently been processed using harsh conditions such that no oleosome vegetable oil bodies would be present (p. 8, lines 9-26). The examiner respectfully disagrees. While the reference gives no express information as to the process of extracting the oil, a person having ordinary skill in the art would have recognized that a cold pressed oil product would have been most suitable as a cosmetics ingredient. Such a cold pressed oil product would have been expected to have vegetable oil oleosomes present, anticipating the instantly claimed invention.

Regarding the reference Marketman (and Kleinig) which describes preparation of fresh coconut juice from young coconuts, applicant argues that neither reference teaches that coconut juice contains vegetable oil oleosomes (p. 9, lines 10-26). The examiner respectfully disagrees. The instant specification clearly describes oleosomes as naturally occurring in the seeds of oilseed crops (e.g. coconuts), and KLEINIG describes oleosomes as being present in all plant tissues, clearly present in the scraped flesh of the young coconut. Thus, a person having ordinary skill in the art would clearly recognize that the product described by Marketman is within the scope of what is now claimed and thus anticipated.

Regarding the rejection of claims 6 & 8 over LORANT and further in view of KAURANEN, applicant argues that neither LORANT nor KAURANEN suggest oil bodies (as per claim 1) (p. 11, line 5). The examiner respectfully disagrees. The argument regarding LORANT has been previously addressed above. The reference KAURANEN has been relied upon for the safflower oil product which KAURANEN describes as "cold pressed" and would have contained vegetable oil oleosomes.

Applicant is reminded that the U.S. Patent Office is not equipped with analytical instruments to test prior art compositions for the infinite number of ways that a subsequent applicant may present previously unmeasured characteristics. In the instant case the examiner has provided reasoned scientific arguments based upon the teachings of the prior art and the instant specification and concluded that the cited references include the composition as currently claimed, and the burden to show otherwise has been properly shifted to applicants. Applicant's primary argument is that the products of the prior art do not contain the claimed vegetable oil bodies (oleosomes). Applicant is in the best position to provide evidence that the cited prior art compositions do not contain said vegetable oil bodies (oleosomes), however, no such evidence has been provided. And while attorney arguments have been fully considered they are not considered of sufficient weight to conclude that the cited prior art compositions do not contain vegetable oil bodies (oleosomes).

Claims 1-4 stand rejected under 35 U.S.C. 102(b) as being anticipated by LORANT; claims 1, 5 and 7 stand rejected under 35 U.S.C. 102(b) as being anticipated by MARKETMAN (as evidenced by KLEINIG); and claims 6 & 8 stand rejected under 35 U.S.C. 103(a) as being obvious over LORANT in view of KAURANEN. The 112-1st paragraph rejection has been overcome by applicants amendment. The 112-2nd rejection of claim 7 is maintained for the reasons discussed above.